Supreme Court, U.S.
FILED
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DUANE J. TILLIMON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

John G. Rust, counsel for Petitioner, hereby certifies that he, on January 25, 1994, served three (3) copies of the foregoing Petition on Daniel R.Pilrose, Esq.,City Prosecutor's Office,555 N. Erie Street, Toledo,OH 43624 by U.S. Mail

First-Class, Postage Prepaid.

Respectfully submitted,

John G. Rust

John G. Rust
Attorney for Petitioner

TABLE OF AUTHORITIES

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QUESTIONS PRESENTED FOR REVIEW

1. In a close case, where the crucial evidence is solely the complaint's word against the Defendant's word, and there has been no police investigation of the alleged crime, nor are there any independant third party witnesses, is the Defendant's right of The Fourteenth Amendment due process violated when either the Prosecutor fails to disclose, (a) and/or objects to the admission of evidence and information favorable to the Defendant which he obtained from interviewing the Complainant, or (b) the trial court denies the Defendant the right to subpoena documents, and/or to introduce into evidence and to cross-examine on documents, all of which contain information

exculpatory to the Defendant, when those documents consist, among others, of City Police Reports, Children Services Agency Investigation Reports, and State Division of Real Estate Investigation Reports, and are the only evidences independant of the influence of either the complainant or the defendant.

2. When the Prosecution obtains information which indicates that the Complainant and the Complainant's witnesses may have additional information and/or evidences which are favorable and exculpatory for the Defendant, is the Prosecutor under a duty to interrogate and investigate the Complainant and others to find all exculpatory evidences and information with the same vigor and thoroughness with which the Prosecution should investigate to prove the accused to be guilty?

3. Under the Brady v. Maryland Doctrine, is the Prosecutor under the same duty to allow evidence exculpatory to the Defendant, when offered by the Defendant to be admitted, as though the Defendant had requested the Prosecution to produce all such exculpatory evidence.

4. In passing on evidence which a Trial Court has excluded or admitted under the Statis Rules of Evidence is such ruling constitutional reversible error, when under the Brady v. Maryland doctrines the Court should not follow the Static Rules of Evidences, but give precedence to the

4. Continued

Fourteenth Amendment Brady v. Maryland principles?

NAMES OF THE PARTIES

(b) The names of the case, as used in the State Courts were:

IN THE OHIO SUPREME COURT, State of Ohio v. Duane J. Tillimon, and in THE COURT OF APPEALS and TOLEDO MUNICIPAL COURT, was: City of Toledo, v. Duane J. Tillimon, although the prosecution was founded on the State Statute.

d) There are no official nor unofficial reports of any Opinions in the case.

e) GROUNDS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(i) and (ii): This Petition For Writ of Certiorari to the Supreme Court of Ohio is grounded on the REHEARING ENTRY of The Ohio Supreme Court of October 27, 1993 which denied Petitioner Tillimon's Motion for Rehearing, of the ENTRY of The Ohio Supreme Court of September 22, 1993, which in turn overruled Appellant Duane J. Tillimon's Motion For An Order directing the Court of Appeals for Lucas County to Certify its Record, and which dismissed the

Appeal for the reason that no substantial constitutional question exists therein.

(iv): The congressional authority believed to confer jurisdiction on this Court to allow this Petition For Writ of Certiorari and Appeal is Title 28, §1257.

(f) The constitutional provision involved is the Fourteenth Amendment, §1 and 2, at Page 45 of the Appendix and Title 4, §1983. Petitioner was prosecuted under Ohio Statutes ORC 2919.23 Interference With Custody, at Page 45 of the Appendix for allegedly orally inviting Wendi Durain, a minor, to go to his home, and Ohio Statute ORC2932.02, Complaint To Keep The Peace, at Page 47 of the Appendix the so-called Peace Bond

Statute, for allegedly threatening "to fuck up" Debra Jankowski; mother of the minor, Wendi Durain.

STATEMENT OF THE CASE

In this Appeal, PEtitioner defends against the Complaint of his tenant, Mrs. Debra Jankowski, on a Peace Bond Complaint that he "threatened to "fuck up" affiant thereby causing her to fear for her safety", allegedly on March 27, 1991, but Mrs. Jankowski did not file her Complaint until May 2, 1991, 8 days after Petitioner had sued Mrs. Jankowski, and her husband, Thomas, for money due for rent. On May 10, 1991, Petitioner sued the Jankowskis for eviction for nonpayment of rent, and 5 days later, on May 15, 1991 Mrs. Jankowski filed the second charge of Interference With Custody, alleging that on August 17, 1990, at a Petitioner's rental house near Petitioner's home, where Mr. and

Mrs. Jankowski were doing some work for money for Petitioner. Petitioner was alleged on three occasions to have invited Mrs. Debra Jankowski's minor daughter, Wendi Durain, to go over to Petitioner's nearby home, and this allegedly constituted a crime under Ohio Revised Code 2933.02, Interference With Custody being a Third Degree Misdemeanor with a potential 60-day jail sentence, and the Peace Bond, a Fourth Degree Misdemeanor with a penalty of a $500.00 bond to keep the peace. The two cases were consolidated on July 9, 1991, and came on for Jury Trial on October 18, 1991. The first constitutional question arose when Petitioner subpoenaed the Lucas County Childrens Services Board to bring in their records of their invetigation

of the very same charges that Petitioner had interfered with Wendi Durain, and wronged her, which investigation PEtitioner himself asked the Lucas County CSB to do, after the Jankowskis counter-sued him on the same charges. Petitioner also subpoenaed the Lucas County CSB to bring in the records available to Lucas County through the Ohio network of Mr. Thomas Jankowski for having physically abused Wendi Durain, in Findlay, Hancock County, Ohio, during the prior year. On March 27, 1991, the day when allegedly Petitioner threatened Mrs. Jankowski, Petitioner had gone to talk to her, because one of Petitioner's former tenants, in a row of 5 houses owned by Petitioner on VanBuren Street,

Toledo, former Tenant had filed a Complaint against Petitioner Tillimon before the Ohio Real Estate Commission claiming that Petitioner had molested Mrs. Jankowski's minor daughter, Wendi Durain, age 10. On March 27, 1991, Mrs. Debra Jankowski denied to Petitioner that she was making any charges that Petitioner had molested 'r done anything wrong to Mrs. Jankowski's daughter, Wendi Durain. Mrs. Jankowski went to tell Petitioner that she knew how persons could be wrongly accused, and even convicted, because her husband, Thomas, had been convicted and sentenced, for child abuse in Findlay, Hancock County, Ohio.

On October 17, 1991 Municipal Court Judge Trimboli, on the Motion to Quash filed by Lucas County CSB on the grounds of confidentiality, ruled

that the CSB was to produce the records on the next day, October 18, 1991, so that the Court could inspect them. In the argument on the Motion to Quash the Lucas County CSB records relating to Wendi Durain and Thomas Jankowski, this Counsel made clear to the Court that Petitioner Tillimon, from what he had learned and observed before, wanted the results of the investigation as to Wendi Durain, age 10 years, and also as to Mr. Jankowski, stepfather, to be produced, because Petitioner claimed, among other things that, Mr. Jankowski had used physical abuse of Wendi and/ or the threat thereof, to cause her to testify against Petitioner Tillimon. Also, Petitioner wanted to show that since he had asked Lucas County CSB, that this was the Act of an innocent

person, and therefore admissible, as a guilty person would not ask for an investigation of such charges. In the Transcript of Proceedings, this counsel stated as follows, at Page 8:

> "The request was that the Lucas County Children Services Board investigate the particular charge about which we are here today. That is what our subpoena is about also."

And the colloquy at Page 9:

> "But, if in those records there is a clear exoneration of Mr. Tillimon, and we go ahead into trial without that, then --
>
> THE COURT: What exoneration of MR. Tillimon? I don't understand. What relevance -- if Mr. Tillimon is requesting an investigation of the child --
>
> MR. RUST: No, he's investigating of the charges made by the parents for the child against MR. Tillimon.
>
> I can see I did not communicate it to you clearly.
>
> THE COURT: Are you saying that the -- that C.S.B. has investigated the specific matter for which we are before this court today?
>
> MR. RUST: That's my under-

standing. Yes, I'm saying that to you, without qualification."

And by this counsel at Page 12, in part:

"...Did the father put the child up to make these charges? Did the mother put the child up to make these charges. What does the child have to say about these charges? Those are matters which we submit have been investigated by the Children Services Board, and that's what we subpoenaed."

And at Page 28:

"...MR. RUST: It -- it has relevance because we claim that this charge is a trumped-up charge, that the parents put the charge -- well, caused -- if the child testifies against Mr. Tillimon, we're claiming here that one or both of the custodial parents -- either Mr. Jankowski or Mrs. Jankowski -- have put the child up to this."

And at Page 44:

"...So, but in the conversation before you, Judge, to which you referred, there was a statement that there was a contact made with Mrs. Debra Jankowski. And I don't know whether it was

a contact made with the daughter at all, from the comments that have been made, but anyhow, there was a discussion with the -- with the mother. If she made statements which are in any way contrary to what she's going to be testifying to in court, then those statements, we submit, are proper and should be considered for purposes of impeachment.

In addition to that, the very sequence of events here is relevant; and it shows that Mr. Tillimon, after he's advised that there is a charge against him, asks, as a citizen, for the Lucas County Children Services Board."

And at Page 49:

"...MR. RUST: Well, we claim that they do, because the papers in there do have statements of the interview or the investigation by the Lucas County Children Services Board with Debra Jankowski wherein she stated specifically what her response was in regard to this criminal charge that we're about here today.

Further, this is -- this is admissible, we claim, for the purpose of showing that there has been in the past, and there was operative at the times that the charge was made in the alleged incident, that the father, Mr. Thomas

Jankowski, exercised undue influence, unlawful and improper influence, over the child, causing the child and the mother to make the charges which have been made here and which we're defending against.

So, I think that -- and -- I'm not saying lastly, but as a part of it, we think these records are proper, should be before the Court, because Mr. Tillimon is going to say that he was interested in seeking the truth. He was ready for a third person to make an investigation and he asked them so to do, regardless of what they did or did not, or whenever they did it, and he thought that they were making an investigation. That's what he wanted.

So, we feel that this is denying to him an essential part of his defense."

Also presented here at this stage is the constitutional issue that the Trial Court in not allowing this counsel nor anyone else to see what the Lucas County CSB records actually showed, one way or another, was preventing judicial review of the Court's rulings.

The above facts were brought out to the Court of Appeals at Page 2 of the Brief:

> "...On October 17, 1991, the actual trial was not started, but the Court heard the Motion to Quash the Lucas County CSB records. At that hearing, Prosecutor Daniel Pilrose made it clear, that he was going to bring out, that Defendant Tillimon, had been convicted before of a felony, involving a minor child, and that he had a legal right so to do, and the Court confirmed that right. Attorney Rust argued, that the Lucas County Childrens Services Board records were relevant, and contained records of a conviction of Mr. Thomas Jankowski in Hancock County, Findlay, Ohio, for child abuse of Wendi Durain. Attorney Rust further claimed that Defendant claimed in this case, that Mr. Jankowski by physical violence and threats, in the past, and currently, had caused Wendi and Debra Jankowski to testify against Mr. Tillimon, without justification and fact. The Court then ordered Lucas County Childrens Services Board to produce the records the next day, and the records were produced, and Judge Trimboli, then rules that the Lucas County CSB

did not have to produce the records in question, and granted the Motion to Quash. For the Law to allow Mr. Tillimon's conviction to be allowed into evidence, but to allow his accuser's conviction not to be allowed is unconstitutional discrimination and unequal treatment."

Mr. Jankowski had abused Wendi Durain, and had influenced and told Wendi Durain what to say. These Hancock County Records became available later, through a subpoena served on the Findlay, Ohio Police, to PEtitioner Tillimon, in a Civil suit, and were attached to a Motion filed in the Court of appeals, to show what could have been brought out, if the Lucas CSB records were not quashed.

We claim that the above requests to the Court for the use of the Lucas County CSB records, and through them, the Findlay, Ohio Police and Fulton

County CSB records and Court conviction of Mr. Jankowski for abusing Wendi Durain, amounted to a request to the Prosecutor under the Brady v. Maryland doctrine, and at the records subpoenaed, and makes an interpretation, the Courts have a right to review, and pass upon, the correctness or error in the Court's ruling. Such is basic. Such is required by the United States Constitution.

Further, through a so-called "central registry", one County Children Services Board has access to the records of investigation of a child in another county, such as Fulton County here. This counsel was denied by the Municipal Judge the right to question the Lucas County CSB representative, on

what was available. We submit, as stated above, that the Fulton County records of investigation of Wendi Durain, and of Mr. Jankowski, do show that the refusal by the Court was a Constitutional error, which calls for this Court to take jurisdiction, and to give obviously needed direction to Trial Courts, Prosecutors, and defense counsel, like this counsel who is not a regular nor experienced criminal lawyer, as the Judge was advised, and the Prosecutor knew. But this counsel and more importantly, Mr. Tillimon, was denied this highly relevant impeaching documentary evidence and information, because from Mr. Tillimon's dealings with the Jankowski family, Mr. Tillimon knew that Mr. Jankowski used his

power to intimidate, and influence Wendi and Debra Jankowski, his wife, to say what Mr. Jankowski wanted.

This counsel has not found any Opinion by this Court which defines what the Prosecutor must do in questioning the Government's witnesses as to the evidence which the accused can use to show his innocence or to impeach the Prosecution witnesses.

In the instant case, the Prosecutor denied both of the above, but stated his plan to use fact that the PEtitioner had been convicted of a felony for an alleged touching of a small boy. But the Court would not allow Petitioner to show Mr. Jankowski's prior conviction of abuse of Wendi Durain, his step-

daughter. This is unconstitutional discrimination. This appears in the Transcript at Page 21:

> "MR. PILROSE: Your Honor, I have one more issue I wish to raise.
>
> It's come to my attention that Thomas Jankowski a couple years ago did plead to a relatively minor charge in connection with his stepdaughter Wendi. I would like a limited instruction that unless there is -- unless there is some sort of evidence brought forth and there is some sort of evidence brought forth and there is some relevancy linked to it, that that charge not be brought up in the courtroom.
>
> MR. RUST: Well, Judge, the relationships between the stepfather and the -- Wendi Durain, the relationships between the mother and Wendi Durain -- who prompted this charge, who caused these charges to be made -- is very relevant in the case, so we want to go into all of the relationships between the parties, and that is one point on which I can tell the Court that we don't want to be prevented from having a fair trial -- by the Court saying, "You can't attach the jugular of a man," or "You can't attack the jugular of a woman," if that

be the case. I'm not saying it's the case as to the woman, but this is a key part of our defense."

Later during the trial, this counsel found out that Complainant Debra Jankowski had filed a Police Report on June 24, 1991, charging Mr. Jankowski with striking her, and their two five-year-old twin boys, all in the presence of Wendi Durain, which we claimed did, and would influence, any 10-year-old step-child. The Trial Court ruled that we could not question about the report, on the objection of the Prosecutor - acts which amounted to a withholding and refusal previously to disclose to the Defendant, after the abusive tactics as to Wendi in Findlay, Ohio had been discussed with the Prosecutor, who knew Petitioner wanted to use the

County CSB records for impeachment.

Again, the Prosecutor, instead of disclosing, objected, and, we claim, thereby denied crucial constitutional rights preventing a Fair Trial under the Constitution. The Transcript of the Proceedings shows this, as follows, ag Page 484:

> "...THE COURT: We're back on the record.
>
> Defense purports to enter into testimony the testimony of the complainant and to cross examine her as to a crime report on domestic violence reported on or about June 24th, 1991. The purpose of the cross examination, as the Court understands it, is to elicit testimony that the child would be in fear of the father, and accordingly, act as he wishes in filing these charges. Is that --"

And at Page 485:

> "...THE COURT: I'm going to make my ruling.
>
> The report that I have before me indicates alleged child abuse, requesting an alleged abuse investigation. They were - - apparently, the subject of the

report -- they were driving in the car and the subject struck the -- one -- three children, one of which testified in this case. No relationship exists and none has been shown to this Court's satisfaction; and therefore, I'm going to continue with my ruling that the Court will exclude this evidence because its probative value will outweigh the prejudice.

MR. PILROSE: Don't you mean the --

THE COURT: Yes, the prejudice will outweigh the probative value.

MR. RUST: Judge, I want to direct your attention here -- and I'll show it to you -- Rule 404, Subsection (B) says "Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts are not admissible to prove the character of a person in order to show that he acted in conformity therewith." I'm not offering it for that purpose.

The Rule goes on, "It may be admissible for other purposes -- comma -- such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity -- comma -- or absence of mistake or accident."

What we're offering it for here is for proving the motive of the daughter in testifying, and implicitly also, the motive of Debra Jankowski in testifying.

> And I submit in addition to that, that when she did testify yesterday, she made some statements that are contrary to this, and as I'm -- that's right. The implications were that things were rosy and that they were good, and so I'm saying that we have the right for each and every and all of those particular grounds to get into evidence.
>
> THE COURT: I have heard nothing. I am going to stay with my decision. I'm not going to allow it in."

The Prosecutor here did not feel he was under any duty to interrogate Complainant Debra Jankowski about any other encounters by Mr. Jankowski with the Police, for any acts like those for which he came in contact with the Fulton County CSB and the Findlay, Ohio Police. At the outset of the trial this counsel told the Prosecutor and court that we claimed Debra Jankowski and Wendi Durain were being caused by Mr.

Jankowski to testify against Mr. Tillimon. In our Brief, in the Court of Appeals, our first two Assignments of Error were:

"ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN NOT ALLOWING DEFENDANT TO INTRODUCE EVIDENCES THAT THE STATE'S WITNESSES WENDI DURAIN AND MRS. DEBORAH JANKOWSKI WERE FEARFUL OF FURTHER VIOLENCE BY MR. JANKOWSKI, AND THAT EACH HAD A MOTIVE TO TESTIFY FOR FINANCIAL OR OTHER GAIN.

ASSIGNMENT OF ERROR III
REASONS

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN NOT GRANTING, AMONG OTHER REASONS AND GROUNDS, A NEW TRIAL FOR THE PROSECUTORIAL ERROR IN NOT DISCLOSING TO DEFENDANT'S COUSNEL THE CRIME REPORT OF JUNE 24, 1992, MADE BY MRS. DEBORAH JANKOWSKI AS TO THE VIOLENCE BY MR. JANKOWSKI AGAINST THEIR TWO TWIN SONS, ALL IN THE PRESENCE OF WENDI DURAIN: AND FURTHER, IN NOT ALLOWING AT THE RESTRICTED HEARINGS ON THE MOTION FOR NEW TRIAL TO QUESTION MRS. JANKOWSKI AND THE PROSECUTOR ON THE EXCHANGE OF INFORMATION CONCERNING THE CRIME REPORT, AND ALL THAT MRS. JANKOWSKI HAD DISCLOSED TO THE PROSECUTOR ABOUT MR. JANKOWSKI'S TREATMENT OF THE FAMILY."

In our Brief in the Court of Appeals, and in our "MEmorandum In Support of Claimed Jurisdiction", in the Ohio Supreme court, we pointed out that the duty of the Prosecutor to disclose exculpatory evidence on guilt, mitigation of penalty, and for impeachment, was obligatory, regardlessof any explicit or implicit request to the Prosecutor. In both we cited or referred to the Brady v. Maryland doctrine, and United States v. Bagley, 473 U.S. 667, were discussed and quoted. In our Memorandum In Support of Claimed Jurisdiction in the Ohio Supreme Court we stated at Page 19:

> "...First of all, as to Law, we claim that Defendant Tillimon was denied his constitutional right to inspect and use in cross-examination the Findlay Abuse Conviction records

on Mr. Jankowski, and also the June 24, 1991 Police Report by Mrs. Debra Jankowski. Once that the Prosecutor is informed of the reports or records, we claim he is under constitutional duty to produce, and to allow their use in cross-examination."

We quoted United States v. Bagley, 87 L.ed.2d from Page 492 for over two pages.

That Mr. Tillimon realistically and accurately evaluated what Mr. Jankowski had done in Findlay, Ohio to put Complainant Debra Jankowski and her daughter, Wendi Durain in fear of going against Mr. Jankowski's wishes, we cite from statements by the Fulton County Case Worker who said, as given in our Court of Appeals Brief, at Page 17, as follows:

"...The alleged child victims ability to protect herself" stated (p. 17)

"Wendy states she is afraid of her stepdad. She is not able to protect or care for herself on her own."

"Deb Durain and Wendy appear to have a strained relationship as Deb is very frustrated with Wendy;s behaviors (enuresis, vomiting, etc.). Wendy states she is afraid of her stepdad and literally shook in his presence when CW first responded to call."

"Tom Jankowski took Wendy to BVH ER on 2-7-89 and she was found to have a strained left middle finger. It should be noted that during this first contact with the family, Wendy was visibly shaking while CW was present in the home. Before CW could even ask anything about what happened, Mr. Jankowski questioned Wendy several times about falling on the ice. Wendy looked down and shook her head."

"Wendy states that 2 weeks ago, step dad also hit her in the eye when mad. He sometimes spanks her with a belt and sometimes with his hand. Wendy states that he also hits her mom when they fight. Wendy states she is afraid of him (Tom Jankowski)."

The Prosecutor here used his official position and standing, impli-

citly to put his personal opinion behind a conviction. 27 O.Jur.2d. Criminal Law, §959, P. 193. Our Court of Appeals Brief reads at Page 25:

> "...At Transcript 543, appears the following portion of Mr. Pilrose's argument, to which objection was made and overruled, and it reads:
>
> ". . .In exchange, I made a promise. Matter of fact, I made two promises. My first promise, I guess, is that I would promise to you that I would bring forth enough evidence to convict the defendant, Mr. Tillimon, to convict him for interference with custody. I believe I've done that. A second promise I made to you in opening statement was that - -
>
> MR. RUST: Your honor, I don't think that the attorneys are supposed to state what they believe about the evidence, as to who's innocent or who's guilty. This is like a statement of what he believes - -
>
> THE COURT: I'm going to overrule your objection, Mr. Rust."

ARGUMENT

I. UNDER THE BRADY V. MARYLAND DOCTRINE, A PROSECUTOR, UNDER THE MANDATOR TO ACT WITH VIGOR THAT THE GUILTY WILL NOT ESCAPE NOR THE INNOCENT SUFFER, MUST INTERROGATE ALL WITNESSES CONTACTED FOR ANY EVIDENCES EXCULPATORY TO AN ACCUSED, ONCE THAT THE PROSECUTOR HAS NOTED THAT SUCH EVIDENCE IS AVAILABLE, BOTH ON THE ISSUE OF GUILT, AND FOR EVIDENCE IN MITIGATION OF PENALTY, AND FOR ANY EVIDENCE THAT MAY BE USED TO ATTACK THE CREDIBILITY OF, OR IMPEACH PROSECUTION WITNESSES, THE PROSECUTOR IS UNDER A DUTY TO QUESTION SUCH WITNESSES. FAILURE BY THE COURTS TO ENFORCE SUCH DUTIES, REGARDLESS, IF, NO REQUESTS BY THE ACCUSED, AND TO ALLOW THE ACCUSED TO CROSS-EXAMINE FULLY ON SUCH MATTERS, CALL FOR REVERSAL.

On November 25, 1991, the Court held only a limited Hearing on Petitioner's Motion for a new trial. This Counsel argued that at that time, that Counsel should be allowed to question Complainant Debra Jankowski, on what she had told Prosecutor Pilrose, and on this the Transcript reads at

Page 4 at the end, as follows:

"Going on to other matters in support of our Motion for a New Trial and Acquittal here, we wanted to take testimony today from Mrs. Debra Jankowski and Prosecutor Dan Pilrose. Not accusing him of any unethical actions or anything like that, but to bring to the attention of the Court and for the record in this case exactly what it was that Mrs. Debra Jankowski knew; and she obviously knew about the report to the police of June 24th, 1991, accusing Mr. Thomas Jankowski of assault upon the two children in the presence of Wendi Durain. And we want to know when it was that the prosecutor, then, was first advised of that record.

Now, it's true that it was subpoenaed on the -- on October the 19th, in the morning. That -- that's -- it was subpoenaed then, at that time.

Now, the State, as I read these cases -- starting with Brady versus Maryland; and there are cases that follow that doctrine -- placed the duty upon the prosecutor to disclose to the defendant any exculpatory or favorable testimony that may relate, really, in any way to the relevant points of the charge against him. And so if the prosecutor knew about this beforehand, then we were not given that."

In United States v. Agurs, 427, U.S. 97, 47 L.ed-2d 342, the basis for the duty of the Prosecutor, and, we say, of the Court, to take all steps necessary for the accomplishment of the Supreme Court's purpose, is given in 427 U.S. at Page 410:

"For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest, that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 US 78, 88, 79 L ed 1314, 55 S Ct. 639. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence."

We quote the Supreme Court in 47 L. ed 2d at Page 354:

"(13 a, 14a, 15) The proper standard of materiality must reflect our over-riding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a

reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."

In Petitioner's case, the Trial Judge restricted and would not allow effective cross-examination of Complainant Debra Jankowski, by asking her all the questions that were relevant, because this Counsel was stopped from using the June 24, 1991 Police Report wherein she had complained of Mr. Jankowski's physical abuse of their five year old twins and of herself. Previously, the Court had refused to allow this Counsel to use the Police Report to cross-examine Complainant Debra Jankowski; Transcript Pages 484-486, discussed herein at Page of this Petition.

Not only were we limited in what we could ask, but we were not allowed to question the Complainant by showing the Police Report to her. Mrs. Jankowski had said that family relations were real good, and to show that the father physically struck the wife and five year old twins indicated a family relationship different than the rosy one she had testified to before. Then at the Transcript at Page 484, the Court indicated her position as follows;

"The Court: We're back on the record.
Defense purports to enter into testimony the testimony of the complainant and to cross examine her as to a crime report on domestic violence reported on or about June 24th, 1991. The purpose of the cross examination, as the Court understands it, is to elicit testimony that the child would be in fear of the father, and accordingly, act as he wishes in filing these charges. Is that --
Mr. Rust:- Not in filing the charge, in her testimony."

The Transcript at Page 501 reads:

"Have you ever made any complaints to the Police Department about that?

Recently or when? When are you talking?

I said "from March the 27th, 1991 to the present."

About the children?

Being -- yes, and your complaints about Mr. Jankowski's treatment of the children.

Mr. Pilrose: Your Honor, I'll object to the question.

The Witness: I do remember one thing, but I don't know if that's going to be relevant.

The Court: Answer the question.

I'm going to allow the question and I'm going to allow the answer, and then we'll have done what we wanted to do.

Do you -- do you have --

The Witness: I remember telling the police, then, one day, that my husband and I got in an argument on the west side of town and he reached in the car and -- and he was made at the boys because they were in there screaming and fighting, and he smacked them. But other than that, no. There was nothing else that I complained to the police about, period.

This ruling prevented this Petitioner's counsel from going into the details, how hard the 5 year olds werehit, their reacting, and the fear of all, or what it was that caused "All the victims left the home for the night."

In the United States v. Bagley 473 US 667, 87 L.ed. 2d 481 (1985) the Court stated in 87 L.ed.2d at Page 491:

"(3) Moreover, the court's reliance on Davis v Alaska for its "automatic reversal" rule is misplaced. In Davis, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. The defense intended by the cross-examination to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination.

This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v Janis, 384 US 1, 3 (16 L Ed 2d 314, 86 S Ct 1245, 7 Ohio Misc 77, 36 Ohio Ops 2d 141), 415 Us, at 318, 39 L Ed 2d 347, 94 S Ct 1105 (quoting Smith (473 US 678) v Illinois, 390 US 129, 131, 19 L Ed 2d 957, 88 S Ct 748 (1968). See also United States v Cronic 466 US 648, 659, 80 L Ed 2d 657, 104 S CT 2039 (1984)."

Any evidence that may be used in cross-examination to impeach the Witness, must constitutionally be disclosed. If the Prosecutor must disclose it to be used, it follows logically that the Prosecutor cannot constitutionally object to the admission of such evidence. But here, then, there were 2 wrongful Acts by the Prosecutor.

It is very difficult for Judges

and Prosecutors to carry out non-adversacal rules, that 2 attorneys in a Civil Case have of going at each other's throat -- the jugular -- tooth and toe nail. But in a Criminal Case the role is different. That is an outstanding reason why this Honorable Court needs to give direction to the Courts, Prosecutors, and Attorneys, pressed into representing an Accused, something with which this Counsel is not experienced. But Justice should prevail.

As to the Constitutional duty to allow full cross-examination, in the United States v. Bagley -- this Court stated in 473 US at Page 690:

"Nor is this case unique. Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial

is necessarily thrown askew. The failure to disclose evidence affecting the overall credibility of witnesses corrupts the process to some degree in all instances, see Giglio v United States, 405 US 150, 31 L Ed 2d 104, 92 S Ct 763 (1972); Napue v Illinois, 360 US 264, 3 L Ed 2d 1217, 79 S Ct 1173 (1959); United States v Agurs, 427 US 97, 121, 49 L Ed 2d 342, 96 S CT 2392 (1976) (Marshall J., dissenting), but when "the reliability of a given witness may well be determinative of guilt or innocence," "Giglio, supra, at 154, 31 L D 2d 104, 92 S Ct 763 (quoting Napue, supra, at 269 3 L Ed 2d 1217, 79 S Ct 1173), and when "the Government's case depend(s) almost entirely on " the testimony of a certain witness, 405 US, at 154, 31 L Ed 2d 104, 92 S Ct 763, evidence of that witness' possible (473 US 691)

bias simply may not be said to be irrelevant, or its omission harmless. As The Chief Justice said in Giglio v United States, in which the Court ordered a new trial in a case in which a promise to a key witness was not disclosed to the jury:

"Without (Taliento's testimony) there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

"For these reasons, the due process requirements enunciated in Napue and other cases cited earlier require a new trial." Id., at 154-155, 31 L Ed 2d 104, 92 S Ct 763."

ARGUMENT II

DENIAL BY THE TRIAL COURT OF EFFECTIVE CROSS-EXAMINATION, WHETHER FROM THE COURT'S GIVING PRIORITY TO A STATE'S RULES OF EVIDENCE, OR THE FAILURE BY THE PROSECUTOR TO DISCLOSE ALL EXCULPOTORY EVIDENCE, INCLUDING THAT FOR IMPEACHMENT, RESULTS IN PREJUDICIAL CONSTITUTIONAL ERROR.

In our Case, the Trial Court ruled that to allow Petitioner to bring out that Mr. Jankowski had been convicted in Findlay, Ohio of Child Abuse of Wendi Durain, his 10 year old stepdaughter, was too prejudicial to Mr. Jankowski, although the Court freely confirmed the Prositution's right to bring out that Petitioner had been convicted of a felony for allegedly touching the buttock of a young boy. Such denied, along with other errors, Petitioned a fair trial.

In this case, there was no police investigation, nor by the Prosecutor. The Ohio Real Estate Commission made an investigation, and made no charges against Petitioner. The Lucas County CSB likewise were requested to investigate the same charges, and made no claims against Petitioner.

Since Petitioner had been convicted before of a felony, and the Prosecutor indicated he would bring this out, and the Court had confirmed his right so to do, this Counsel on Voire Dire had asked the prospective Jurors if each would be guided by that conviction, regardless. The prospective Jurors said their minds were set against Petitioner, and were excused for Cause.

But this shows how hard it is

for a convicted person like Petitioner, in "the real world", to get a fair trial.

This case was just a question of one person's word against another -- a swearing contest. Therefore, the gr ter the need that each person be given his or her full right to go against the other.

The United States Constitution, in assuming a Fair Trial, should take precedence over a Statis Rule of Evidence. to him. To allow Mr. Tillimon's conviction to be brought out, but to suppress Mr. Jankowski's conviction, was unconstitutional. In United States v. Bagley, 473 US 667, 87 L.ed.2d. 481, the Court stated: in 473 US at Page 676

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(2) In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 US 150, 154, 31 L ED 2d 104, 92 S Ct 763 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 US, at 87, 10 L Ed 2d 215, 83 S Ct 1194, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 US 264, 269, 3 L Ed 2d 1217, 79 S Ct 1173 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interes- of the witness in testifying falsely that a defendant's life or liberty may depend").

The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses." 719 F2d, at 1464. Relying on Davis v Alaska, 415 US 308, 39 L Ed 2d 347, 94 S Ct 1105 (1974), the Court of Appeals held that the Government's

failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutes "constitutional error of the first magnitude" requiring automatic reversal. 719 F2d at 1464 (quoting Davis v Alaska, supra, at 318, 39 L Ed 2d 347, 94 S (Ct 1105).

This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In Giglio v United States, supra, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key Government (473 US 677) witness that he would not be prosecuted if he testified for the Government. This Court said:

> "When the reliability of a given witness may well be determinative of guilt or innocence," non-disclosure of evidence affecting credibility falls within th(e) general rule (of Brady). We do not however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict..." A finding of materiality of the evidence is required under Brady....A new trial is required if the false testimony could...in any reasonable likelihood have affected the judgment of the jury"

405 US, at 154, 31 L Ed 2d 104, 92 S Ct 763 (citations omitted).

There were numerous errors, each and all of which denied Mr. Tillimon a Fair Trial.

The Court instructed the Jury that the Jury on the issue of guilt if the Interference with custody, that the Jury could not consider the delay in filing although the Complainant Debra Jankowski delayed from August 17, 1990 until after Mr. Tillimon had sued once for unpaid rent, and secondly for eviction. On this Our Brief in the Court of Appeals stated:

> "The Court, at page 578 of the Transcript in its instructions, stated in part:
>
> "For purposes of this case, it is stipulated by and between the parties that the complaint was filed on May 15, 1991. The fact that it was filed may not be considered for any other purpose".

The Court wilfully referred to state that the Prosecutor had wrongfully referred to a fact not in evidence. Our Brief in the Court of Appeals this at Page 23:

> At TR 586, the record shows the following proffer by Mr. Rust:
>
> > "In the Argument to the Jury by Mr. Rust, at TR 550, Mr. Rust argued that since the father of Mr. Jankowski, a policeman, had allegedly, according to the testimony, counselled them, and helped them to work with the police to try to get the charge against Mr. Tillimon filed, when the Jankowskies were having trouble doing it, and this was a part of their explanation of why it was not filed until May 15, 1991, Mr. Rust argued, that if Mr. Jankowski had a father who was a policeman," at TR 550... why didn't they bring him to the witness stand here before you today? ..."
>
> Mr. Pilrose then argued, at TR 565, that the father was not called

to the witness stand, in part, also because he had died. There was no evidence of this in the record. We claim this is prejudicial error because it makes the defense attorney look silly for making such an argument. Also, counsel is not supposed to argue to the Jury about something which is not in the evidence. This is admitted now, by Mr. Pilrose, that it was not in the record.

Before the jury brought in its verdict, Mr. Rust, who in the meantime had verified this with Mr. Pilrose, asked for the matter to be corrected on the record. Thus, the Transcript at TR 589 reads in part as follows:

> "...Okay. Secondly, Mr. Rust you wanted to put something in the record.

Just for the record, a knock was heard on the door. I'm to believe the jury has a question. I'm bringing them back to see what that question is and to see if I can answer that question.

Mr. Rust: My request to the Court was that the jury be advised as to whether or not in the evidence introduced it was ever introduced that Mr. Jankowski, Sr., the father of Tom Jankowski, died. It makes me look like I'm saying, "Why didn't they bring a dead man here?"

I didn't say anthing when Mr. Pilrose was making that argument because I could not remember I talked to him afterwards; he said he couldn't remember whether it was in the evidence or whether his client had told him that. That's why I'm bringing it to your attention at this time.

I think the jury ought to be advised that they should not take it against the defendant if there was no evidence introduced from the jury box that Mr. Jankowski, Sr., the father had died.

The Court: I decline to give any further information to the jury. My instructions were explicit that the evidence only included testimony received from the witnesses, and that was the only testimony they were to consider along with the exhibits.

The Trial Court refused to allow Mr. Tillimon to testify about acts he would not have done if not innocent. Firstly, Mr. Tillimon was not allowed to state that when Mr. Tillimon received from the Ohio Real Estate Commission, a charge or accusation which merely said that he had wronged a young girl living on Van Buren Street, that Mr. Tillimon volunterred information that the Commission was free to investigate, and gave them the name of Wendi Durain, as the Commission had no girl identified by name. Mr. Tillimon invited the Ohio Real Estate Commission and the Lucas County CSB to investigate anything each wanted to investigate about him, but each made no charges against him. At Page 10 of our Brief in the Court of Appeals, we stated:

" The Columbiana County Court of Common Please stated in State of Ohio vs. Gardner Tappan, (1817) as follows:

"...Flight has ever been considered as an evidence of guilt; a voluntary appearance is equal evidence of innocence. In neither case is such evidence conclusive; but is both it is material to a full understanding of the case. (emphasis added)

In State of Ohio, v. Milam Appellant 108 Ohio App. 254 the Appeals Court stated at Page 265:

> "The law permits the inference that a person fleeing from a crime does so out of a consciousness of guilt. The law should likewise permit the inference that a person, though opportunity offers, does so because of no consciousness of guilt." (emphasis added)
> 2 Wigmore on Evidence (3 ED.), 111, Section 276, 15 Ohio Jurisprudence (2d), 510, Criminal Law, Section 343, and cases cited.

The Trial Court should have permitted evidence which show that the conduct of Mr. Tillimon was not that of a person guilty of the crime he was accused of. Why would

Mr. Tillimon was not that of a person guilty of the crime he was accused of. Why would Mr. Tillimon request investigations by three separate authorities if he were guilty? Is Mr. Tillimon to be presumed guilty because the authorities, i.e., the Court and the Lucas County Children Services Board, like the Toledo Police Division, chose not to investigate? What action is appropriate for an innocent person to take to prove his innocence? These evidences are highly probative.

When in the Civil Action the Jankowski's Counter-Claimed against him for wronging Wendi Durain, Mr. Tillimon by filing his Rule 35 Motion for an Investigation and Examination of Wendi Durain, in

in effect Mr. Tillimon asked for a Court supervised investigation, but the Court would not allow him to testify on that.

CONCLUSION

This Counsel, 78 years of, respects the high traditions of scholarship of this Honorable Court, and promises to work and to achieve a level which the attorney should attain.

While this Counsel has not cited a multitude of decisions, this Counsel submits that the reasoning and the points raised show that this Counsel can and will do his part.

There are glaring needs for direction from this Honorable Court. While America is seriously facing the real problems of Violence and Crime, America particularly needs the mandate from this Court to all concerned to maintain a proper, intelligent, and realistic respect for all those values which make America the greatest nation

in the World.

Respectfully submitted,

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